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7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 BONA FIDE CONGLOMERATE, INC.,
12 Plaintiff,
13 v.
14 SOURCEAMERICA, et al.,
15 Defendants.

Case No.: 14cv0751 GPC (AGS)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT OR,
ALTERNATIVELY, FOR PARTIAL
SUMMARY JUDGMENT**

16
17 AND RELATED COUNTERCLAIMS

Date: July 14, 2017
Time: 1:30 p.m.
Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D (Schwartz)

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1 **I. INTRODUCTION**

2 Defendant SourceAmerica's Motion for Summary Judgment or, Alternatively,
3 Partial Summary Judgment ("Motion") (Dkt. 406), should be denied.

4 The Motion attacks solely the damages element of Plaintiff Bona Fide
5 Conglomerate, Inc.'s ("Bona Fide"), claim for breach of the parties' July 27, 2012
6 settlement agreement ("Agreement").

7 SourceAmerica's challenge to the foreseeability of Bona Fide's lost profits fails.
8 Virginia law recognizes that the parties to commercial contracts nearly always
9 contemplate lost profit damages. The Agreement settled allegations that
10 SourceAmerica unlawfully denied Bona Fide fair or equal treatment resulting in the
11 loss of the AbilityOne Program ("Program") contracts, and obligates SourceAmerica to
12 use its best efforts to treat Bona Fide objectively, fairly, and equitably, and provide it
13 equal, non-discriminatory access to the Program. Given the Agreement's purpose and
14 provisions, the parties must have reasonably foreseen that if SourceAmerica breached
15 its contractual obligations, Bona Fide would lose profits from future Program contracts
16 denied it on account of such breaches. SourceAmerica's contrary legal arguments lack
17 merit.

18 Conceding causation for purposes of the Motion, SourceAmerica asserts that
19 Bona Fide's lost profits damages are too speculative to recover. But lost profits
20 damages can be speculative both as to causation and their amount, and most of
21 SourceAmerica's damages arguments are directed at causation. With causation
22 conceded, Virginia contract law provides that SourceAmerica cannot escape all
23 liability and Bona Fide has the right to present its damages evidence at trial.

24 SourceAmerica also argues that the amount of Bona Fide's damages is not
25 reasonably certain because Bona Fide merely speculates that it would have won all of
26 the Program contracts at issue. However, SourceAmerica addresses only the strictist of
27 three Virginia law standards governing proof of the amount of damages. Virginia
28 courts apply one of three different damages tests, which observers have called the

1 “Reasonable Certainty,” “Fact and Amount,” and “Wrongdoer” tests. R.M., Lloyd,
2 *The Reasonable Certainty Requirement In Lost Profits Litigation: What It Really*
3 *Means*, 12 Transactions 11, 44-46 (2010). The “Fact and Amount” and “Wrongdoer”
4 tests require a lesser showing than “Reasonable Certainty” because the breaching party
5 made proof of damages more difficult, engaged in blameworthy conduct, or both.

6 The “Fact and Amount” test applies here because SourceAmerica’s breach
7 prevented Bona Fide from obtaining future Program contracts and the only means of
8 proving damages is to estimate Bona Fide’s probable profits. Alternatively, the
9 “Wrongdoer” test applies because SourceAmerica’s willful breaches of the Agreement
10 violated federal procurement laws and were arbitrary and discriminatory. Under either
11 the “Fact and Amount” and “Wrongdoer” tests, a reasonable jury could find that Bona
12 Fide would have obtained all of the Program contracts it pursued but for
13 SourceAmerica’s breaches of the Agreement.

14 Finally, SourceAmerica contends that Bona Fide cannot show the amount of its
15 lost profit damages because it has no evidence of such damages. Not so. Following
16 the Court’s granting of Bona Fide’s application under Federal Rule of Civil Procedure
17 56(d), SourceAmerica produced sufficient damages-related discovery for Bona Fide to
18 calculate a provisional estimate of its lost profits damages incurred through March 31,
19 2017 of \$10,980,806.89. Bona Fide anticipates that this estimate will increase as the
20 parties engage in further fact and expert discovery.

21 The Motion also asserts that Bona Fide’s damages are barred because it failed to
22 mitigate its damages by not filing Tucker Act bid protests in the Court of Federal
23 Claims. This argument fails because the costs of doing so would be unreasonable, it is
24 contrary to the law of the case, and Bona Fide cannot be required to sue a third party to
25 the Agreement, the United States, instead of directly suing SourceAmerica.

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II. FACTUAL BACKGROUND

A. **Bona Fide Provides Services To The United States Through The Program.**

Bona Fide has been providing services to the U.S. General Services Administration (“GSA”) on Program contracts since 2005. It currently provides services to GSA on five Program contracts in three different states (PMF¹ 1-2).

The Program is a federal government procurement system, which procures services provided by nonprofit agencies employing severely disabled persons (“NPAs”). Once a service and NPA are added to the so-called Procurement List maintained by the U.S. AbilityOne Commission (“Commission”), federal agencies must procure that designated service from the designated NPA unless the NPA cannot meet the agency’s demand. A NPA retains its mandatory sourcing designation as long as it desires or until the procuring agency no longer requires the designated service (PMF 3-4).

SourceAmerica administers the AbilityOne Program on behalf of the Commission and acts as the exclusive sales agent for a network of NPAs. Among other things, SourceAmerica distributes opportunities for Program contracts (“Opportunities”) among NPAs. Only the Commission may award a Program contract. SourceAmerica selects the NPA to recommend to the Commission, which rubber stamps SourceAmerica’s decision. NPAs compete against each other for Opportunities in bidding competitions organized and evaluated by SourceAmerica. SourceAmerica solicits NPA’s bids on Opportunities by issuing a Sources Sought Notice (“SSN”), which is the functional equivalent of bidding specifications (PMF 5-7).

B. **Bona Fide’s 2010 and 2012 Bid Protests.**

In 2010, Bona Fide filed a bid protest in the Court of Federal Claims challenging the Commission’s award of a Program contract to a rival NPA, which was based on SourceAmerica’s recommendation (“First Bid Protest”). The United States mooted the

¹ “UMF” refers to the facts that SourceAmerica has designated as undisputed and material on its separate statement. “PMF” refers to the facts Bona Fide has designated as material in its Separate Statement.

1 First Bid Protest by agreeing to resolicit the Opportunity. On resolicitation,
2 SourceAmerica again recommended Bona Fide's rival, and the Commission again
3 adopted SourceAmerica recommendation (PMF 9-11).

4 In 2012 Bona Fide challenged the resolicitation in a Second Bid Protest against
5 the United States in the Court of Federal Claims. There, Bona Fide alleged, among
6 other things, that: (1) SourceAmerica denied it a "fair opportunity to compete" in
7 violation of procurement laws and disregarded bidding specifications, and but for
8 SourceAmerica's conduct, Bona Fide would have won the contract; and
9 (2) SourceAmerica and GSA subjected Bona Fide to "discriminatory and retaliatory
10 actions" including the "denial of an award." It cost Bona Fide more than \$100,000 to
11 litigate the First and Second Bid Protests (PMF 12-14).

12 **C. The Agreement Resolves Bona Fide's 2012 Bid Protest.**

13 The Agreement resolved the Second Bid Protest (UMF 2, PMF 15). Its recitals
14 state that SourceAmerica has been designated "to support [NPAs] participating in the
15 AbilityOne Program," Bona Fide is a NPA that performs services "on contracts in the
16 AbilityOne Program," and Bona Fide alleges that SourceAmerica's violation of
17 procurement laws and its internal processes "result[ed] in allocations of contracts to
18 other [NPAs], rather than to Bona Fide" and retaliated against Bona Fide for reporting
19 "improper actions and/or utilizing proper methods of redress." (PMF 16-18).

20 To settle these allegations, SourceAmerica agreed in Section 1.2 to "use best
21 efforts" to provide that Bona Fide is treated "objectively, fairly, and equitably . . . with
22 specific attention to contract allocation" and "afforded equal access to [its] services."
23 (UMF 1). The Agreement does not contain any provisions limiting SourceAmerica's
24 liability or make any disputes arising thereunder subject to the Tucker Act, 28 U.S.C. §
25 1491(b)(2). SourceAmerica is not a United States agency and the United States is not
26 a party to the Agreement (PMF 19-22).

27 Bona Fide agreed to settle and release its claims in the Second Bid Protest
28 because the Agreement represented a means to hold SourceAmerica accountable for its

1 actions, including suing for money damages for breach of contract. Absent the
2 Agreement, Bona Fide did not have a contract relationship with SourceAmerica and
3 could only sue in the Court of Federal Claims to have the Commission's contract
4 awards set aside (PMF 23-24).

5 **D. SourceAmerica Breaches The Agreement.**

6 **1. Bona Fide Receives No Opportunities After The Agreement.**

7 Since the parties entered the Agreement on July 27, 2012, Bona Fide has applied
8 for SSNs 1483 (Ft Hood), 1692 (Lakewood), 1723 (VA HQ), 1741 (DOD-IT), 1944
9 (St. Elizabeth's), 2075 (NGA II), 2161 (Puerto Rico), 2379 (USDA), 2381 (Capitol),
10 2410 (JFK), 2693 (Wright-Patterson), 2705 (Shaw AFB), 2783 (Chicago), 2808 (Camp
11 Lejeune), and RFI 1953 (NGA I). SourceAmerica has not distributed any of these
12 Opportunities to Bona Fide (PMF 25).

13 **2. Robinson Admits That SourceAmerica Breached The Agreement.**

14 SourceAmerica's obligations under Section 1.2 of the Agreement include
15 reasonably monitoring Bona Fide's participation in the Program (UMF 1). Jean
16 Robinson (SourceAmerica's former Senior Vice President, Chief Legal Officer, and
17 General Counsel) admitted to Ruben Lopez (Bona Fide's CEO) that Robert
18 Chamberlain (SourceAmerica's former CEO) ordered his subordinates not to distribute
19 any Opportunities to Bona Fide after the parties entered into the Agreement (PMF 26).

20 Among other things, Robinson admitted to Lopez that SourceAmerica

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED] contrary to federal procurement laws and practices (PMF 28-32).

25 On May 6, 2013, September 6, 2013, September 25, 2013, and November 18,
26 2013, Lopez recorded his conversations with Robinson wherein she admitted that

27 (a) [REDACTED]

28 [REDACTED] (b) [REDACTED]

1 [REDACTED]
2 [REDACTED] (c) [REDACTED]
3 [REDACTED] (d) the [REDACTED]
4 [REDACTED] (PMF 33-37).

5 **E. SourceAmerica Limits Its Summary Judgment To Damages.**

6 SourceAmerica filed its Motion on March 20, 2017, attacking only the damages
7 element of Bona Fide’s breach of contract claim and asserting its mitigation of
8 damages defense (Dkt. 370, 2:3-3:8). On April 6, 2016, Bona Fide filed an *ex parte*
9 request under Rule 56(d) (PMF 38). In opposition to Bona Fide’s Rule 56(d)
10 application, SourceAmerica conceded that its motion assumed causation:

11 SourceAmerica’s Motion is premised on the assumption, that even if Bona
12 Fide could establish causation, it cannot meet its burden of proof with
13 respect to damages. . . . Each of [the Motion’s] inquiries assumes
arguendo that SourceAmerica’s alleged breach proximately caused Bona
14 Fide’s alleged lost profits.
(PMF 39).

15 During the hearing on the Rule 56(d) application, the Court acknowledged
16 SourceAmerica’s concession (PMF 40).

17 **F. SourceAmerica Produces Damages-Related Discovery.**

18 The Court granted Bona Fide’s Rule 56(d) application and SourceAmerica
19 produced damages-related discovery to Bona Fide on May 15, 2017 (PMF 40-41).

20 **III. LEGAL STANDARD**

21 A “shifting burden of proof” governs Rule 56 motions. In re Oracle Corp. Sec.
22 Litig., 627 F.3d 376, 387 (9th Cir. 2010). Where the nonmovant bears the burden of
23 proof at trial, the movant need only prove that there is an absence of evidence to
24 support the nonmovant’s case. Id. The burden then shifts to the nonmovant to
25 designate genuine disputes of material fact for trial. Id.

26 In contrast, where the movant bears the ultimate burden of proof, it must
27 establish “beyond controversy every essential element of its [claim or defense].” S.
28 Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003). The burden

1 shifts to the nonmovant to show that “the evidence, taken as a whole, could lead a
2 rational trier of fact to find in its favor.” Id.

3 The Court must deny a Rule 56 motion if the movant fails to discharge its initial
4 burden. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970). It draws all
5 inferences and views all evidence in favor of the nonmovant. T. W. Elec. Serv., Inc. v.
6 Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630-31 (9th Cir 1987).

7 **IV. ARGUMENT**

8 **A. SourceAmerica Is Not Entitled To Summary Judgment On Damages.**

9 To recover lost profits for breach of contract under Virginia law,² Bona Fide
10 must show: (1) the parties contemplated such consequential damages at the time of
11 contracting; (2) causation; and (3) amount of damages. E. I. Du Pont Nemours & Co.
12 v. Universal Moulded Prods. Corp., 191 Va. 525, 573 (1950), superseded by statute on
13 other grounds in Doe v. Carilion Med. Ctr., 65 Va. Cir. 104, 107 (Cir. Ct. 2004).
14 Causation and the amount of damages must be proven with reasonable certainty. Saks
15 Fifth Ave., Inc. v. James, Ltd., 272 Va. 177, 188 (2006). All of these are factual
16 questions for a jury to resolve. Roanoke Hosp. Ass’n v. Doyle & Russell, Inc., 215 Va.
17 796, 801 (1975) (foreseeability); Com. Bus. Sys. v. Bellsouth Servs., 249 Va. 39, 49-
18 50 (1995) (fact and amount of resulting damage). And, genuine disputes of material
19 fact defeat summary judgment on the three requirements.

20 **1. Bona Fide’s Lost Profits Are Foreseeable, Consequential Damages.**

21 Lost profits are recoverable under Virginia law if they were actually or
22 reasonably foreseeable by the parties at the time of contracting. Duggin v. Williams,
23 233 Va. 25, 28-29 (1987). Foreseeability is an objective, reasonable person inquiry.
24 Roanoke Hosp., 215 Va. at 801 n.4.

25 SourceAmerica fails to cite any evidence supporting its assertion that Bona
26 Fide’s damages were not reasonably foreseeable by the parties at the time of

27
28 ² The Agreement contains a Virginia choice-of-law provision (UMF 2).

1 contracting. Fed. R. Civ. P. 56(c)(1), (3). It cannot do so in reply. CivLR 7.1(f)(2);
2 Zamani v. Carnes, 491 F.3d 990, 997 (2007). Thus, SourceAmerica has not carried its
3 initial burden on this point. Adickes, 398 U.S. at 159.

4 Bona Fide's lost profits were reasonably foreseeable to the parties because the
5 Agreement created a framework to protect Bona Fide's future efforts to compete for
6 Program contracts.³ The Agreement's recitals recognized Bona Fide's Second Bid
7 Protest allegations that it lost AbilityOne contract awards it should have won because
8 SourceAmerica: (1) denied it the opportunity to compete fairly in violation of
9 procurement laws and regulations and SourceAmerica's own processes; and
10 (2) engaged in discriminatory and retaliatory conduct against Bona Fide (PMF 12-13,
11 16-18). To settle these allegations, SourceAmerica agreed, on a going-forward basis,
12 to use "best efforts" to treat Bona Fide objectively, fairly, and equitably, and to afford
13 it equal access to services (UMF 1). Such framework was necessary because
14 SourceAmerica has exclusive control over the distribution of Program Opportunities to
15 NPAs and Bona Fide lacked a direct remedy against it (PMF 5-7, 23).

16 Because the Agreement was intended to protect it from the loss of business and
17 damages resulting from SourceAmerica denying it the opportunity to compete fairly or
18 discriminating against it, Bona Fide's lost profits were reasonably foreseeable to the
19 parties at the time of contracting (PMF 24). R.K. Chevrolet v. Hayden, 253 Va. 50, 56
20 (1997) (plaintiff's lost profits were recoverable because parties understood that
21 contract's purpose was to prevent such losses due to defendant's abrupt departure from
22 employment).

23 ///

24 ³ In Virginia, the contracting parties' intent "should be ascertained, whenever possible,
25 from the language the parties employed in the contract." Va. Elec. & Power Co. v.
26 Norfolk S. Ry. Co., 278 Va. 444, 458 (2009). The Court must not only consider the
27 words used by the parties, "but their object and purpose, as disclosed by the language,
28 by the subject matter, the condition and situation of the parties" Carpenter v. Gate City,
185 Va. 734, 740 (1946). "Consideration must be given to the general circumstances
surrounding or attending its execution, and effect given to each provision, if possible."
Id. at 740-41.

1 SourceAmerica's contrary arguments fail. First, citing no supporting law,
2 SourceAmerica argues that lost profits were not foreseeable because the Agreement
3 does not guarantee Bona Fide "any contract award or any sort of profit," and
4 SourceAmerica cannot guarantee that the Commission or a contracting agency would
5 accept its recommendation (Dkt. 406, 15:16-17:2).

6 This argument fails. Virginia law recognizes that questions concerning the
7 likelihood of obtaining future business bear on whether damages are sufficiently
8 certain, not on foreseeability; foreseeability and certainty "are entirely separate and
9 independent, and to blend them tends to confusion." Du Pont, 191 Va. at 572. As
10 discussed in section A.3 below, Bona Fide's damages are certain.

11 Second, SourceAmerica argues that lost profits were unforeseeable since the
12 Opportunities at issue were not known to the parties in 2012 (Dkt. 406, 15:5-19:10).
13 Virginia law also rejects this proposition.

14 In Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., 267 Va. 642
15 (2004), the parties entered into two agreements whereby plaintiff agreed to sponsor
16 state university entity defendants research related to its patent, defendants were
17 required to "make every effort" to develop mass production prototypes of plaintiff's
18 technology, and the parties would split the intellectual property rights resulting from
19 defendants' research. The defendants failed to assign those rights, causing plaintiff to
20 lose profits from licensing those rights to a third party. The trial court awarded lost
21 profits as foreseeable, consequential damages.

22 On appeal, the Virginia Supreme Court affirmed. Given the two agreements'
23 recitals and provisions, plaintiff's lost profits were the nature and type of consequential
24 damages that a "reasonably prudent person in the position of the [contracting parties]"
25 would have foreseen from the breach, i.e., the failure to assign the intellectual property
26 rights. As such, it was not necessary that the third-party contract "in particular or the
27 exact consequential damages claimed by [plaintiff] be in fact foreseen or reasonably
28 foreseeable by the parties." Id., at 654-56.

1 The same is true here. Given the Agreement's purpose and language, it was
2 reasonably foreseeable to the parties that Bona Fide would make future bids on future
3 Program contracts (resulting in future revenues to Bona Fide), as long as
4 SourceAmerica provided even-handed support and assistance as promised.
5 Accordingly, Bona Fide's lost profits were reasonably foreseeable to the parties in the
6 event of a breach (PMF 24).

7 Third, SourceAmerica argues that Bona Fide's lost profits were not foreseeable
8 to it because lost profits are never recoverable in bid protests under the Tucker Act,⁴
9 28 U.S.C. § 1491(b)(2), and federal contracting agencies, not SourceAmerica, would
10 have been responsible for paying Bona Fide (Dkt. 406, 16:21-19:10).

11 However, the Agreement does not contain any clause or provision purporting to
12 limit SourceAmerica's liability or make disputes arising thereunder subject to the
13 Tucker Act (PMF 19-20). Unlike the Tucker Act, Virginia law permits the recovery of
14 lost profits because "[n]early all commercial contracts are entered into in
15 contemplation of future profits." Manss-Owens Co. v. Owens & Son, 129 Va. 183, 203
16 (1921); Agostini v. Consolvo, 154 Va. 203, 215-16 (1930).

17 Moreover, SourceAmerica is not a federal agency and the United States is not a
18 party to the Agreement (PMF 21-22).

19 **2. SourceAmerica Concedes Causation.**

20 The second element of damages obligates Bona Fide to establish "a causal
21 connection between the defendant's wrongful conduct and the damages asserted." Saks
22 Fifth Ave., 272 Va. at 189.

23 SourceAmerica concedes causation for purposes of the Motion (PMF 39-40).
24 The concession is binding on SourceAmerica, Am. Title Ins. Co. v. Lacelaw Corp.,
25 861 F.2d 224, 226 (9th Cir. 1988), and the Court may not entertain this or any
26 ///

27
28 ⁴ As further explained in section IV.B. below, the law of the case bars this argument.

1 other causation-related arguments by SourceAmerica, Amgen Inc. v. Conn. Ret. Plans
2 & Tr. Funds, 568 U.S. 455, 133 S. Ct. 1184, 1197 n.6 (2013).

3 Because SourceAmerica concedes causation for purposes of this Motion, the
4 Court should ignore SourceAmerica's causation argument dressed as an amount of
5 damage argument. Citing Hop-In Food Stores v. Serv-N-Save, 247 Va. 187 (1994),
6 SourceAmerica argues that Bona Fide's damages are too speculative because it cannot
7 establish that it would have been awarded the Opportunities and contracts at issue⁵
8 (Dkt. 406, 19:2-22:19). In Hop-In Food Stores, plaintiff's evidence "failed as a matter
9 of law to establish that, but for the removal of its equipment, [plaintiff] would in the
10 future ever have sold gasoline on the leased premises. Thus, it is uncertain whether in
11 the future [plaintiff] would have earned any profits at all. . . .". Id., at 190, 193.

12 SourceAmerica's Hop-In Food Stores supported argument is directed at
13 causation, not the amount of damages: "As to the recovery of speculative or uncertain
14 damages, the rule is stated . . . as follows: 'The rule against recovery of uncertain
15 damages generally has been directed against uncertainty as to cause rather than
16 uncertainty as to measure or extent.'" Kiser v. Amalgamated Clothing Workers, 169
17 Va. 574, 588 (1938).

18 **3. The Motion Fails To The Extent It Attacks The Amount Of Damages.**

19 The third element of damages obligates Bona Fide to "prove the amount of those
20 damages by using a proper method and factual foundation for calculating damages."
21 Saks Fifth Ave., 272 Va. at 189. While "damage calculations based on unsupported
22 projections are improper," it "need not establish the specific amount of the loss or
23 damage with absolute certainty." Condo. Servs. v. First Owners' Ass'n of Forty Six
24 Hundred Condo., Inc., 281 Va. 561, 577 (2011).

25 ⁵ SourceAmerica also cites Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 301
26 (1997) for the proposition that Bona Fide must show a "business expectancy" in the
27 profits it claims and cannot rely on "a subjective belief or hope that the business
28 relationship would continue" or "merely a possibility that future economic benefit
would accrue." (Dkt. 406, 19:19-24). Halifax is inapposite to Bona Fide's contract
damages because that opinion discusses the elements of tortious interference, not
contract damages. Id., at 301-303.

1 SourceAmerica's attacks on the amount of Bona Fide's damages fail for any
2 number of independent reasons.

3 **a. Substantive Virginia Law Precludes A Summary Judgment**
4 **Attack On The Amount Of Bona Fide's Damages.**

5 The Motion fails to the extent that SourceAmerica argues that the amount of
6 damages is uncertain. Virginia courts recognize that a plaintiff's opportunity to prove
7 that its lost profits are not speculative "comes at trial, not in response to a motion for
8 summary judgment." Interactive Return Serv. v. Va. Polytechnic Inst. & State Univ.,
9 52 Va. Cir. 161, 172 (Cir. Ct. 2000). SourceAmerica's cited authority, ADC Fairways
10 Corp. v. Johnmark Constr., Inc., 231 Va. 312, 318 (1986), is inapposite in that the
11 plaintiff was allowed to present its lost profits evidence at trial, which the reviewing
12 court deemed insufficient on appeal.

13 "[A] party who has broken his contract will not ordinarily be permitted to escape
14 liability because of the uncertainty in the amount of damage resulting and the fact that
15 the full extent of the damages for the breach must be a matter of speculation is not a
16 ground for refusing all damages." Kiser, 169 Va. at 588; see, e.g., Hollander v.
17 Hollander, 86 Va. Cir. 546, 551 n.3 (Cir. Ct. 2013) (argument that "Plaintiffs cannot
18 prove with any certainty damages even presuming [breach and causation]" was
19 "without merit").

20 SourceAmerica cannot escape payment of all damages as a matter of law,
21 Mullen v. Brantley, 213 Va. 765, 770 (1973), and Bona Fide has "the right to prove"
22 the amount of its damages to a properly-instructed jury, Kiser, 169 Va. at 589.

23 **b. Bona Fide Has Suffered Non-Speculative Damages Of**
24 **\$10,980,806.89 Through March 31, 2017.**

25 According to SourceAmerica, Bona Fide's lost profits estimate, which consists
26 of the sum of its expected profits from the Opportunities at issue, is "completely
27 speculative" and not reasonably certain under ADC Fairways (Dkt. 406, 20:6-19).
28

1 As noted, Virginia courts apply one of three different damage tests—Reasonable
2 Certainty, Fact and Amount, and Wrongdoer—depending on case facts. Lloyd, supra,
3 at 44. The majority of Virginia lost profit opinions apply the Reasonable Certainty rule.
4 Id. Other lost profit opinions apply a Fact and Amount rule, a Wrongdoer rule, or both.
5 Id. at 44-46. These courts “appear to choose which standard to articulate in their
6 opinions based on the outcome of the case,” taking into account the degree to which
7 uncertainty in the amount of damages is attributable to the defendant (Fact and
8 Amount) and the moral blameworthiness of the defendant’s conduct (Wrongdoer). Id.
9 at 44-47 & nn. 129-136. This section discusses the Reasonable Certainty and Fact and
10 Amount tests. The Wrongdoer test is discussed in the following section.

11 The Reasonable Certainty test provides that lost profit damages are recoverable
12 “only to the extent that the evidence affords a sufficient basis for estimating their
13 amount in money with reasonable certainty.” ADC Fairways, 231 Va. at 318.
14 Damages are not recoverable if they “are so uncertain, contingent and imaginary as to
15 be incapable of adequate proof.” Du Pont, 191 Va. at 570.

16 ADC Fairways applied the Reasonable Certainty test to disallow the recovery of
17 imaginary damages incapable of adequate proof. There, the trial court awarded the
18 plaintiff home builder its lost profits for work that it had not completed pursuant to its
19 contract with the defendant land developer. The builder adduced testimony that its bid
20 for the work assumed a 15% profit margin based on estimated expenses. However, the
21 developer introduced evidence that the builder had previously estimated a 7.5% profit
22 margin on a different job with the developer, but had made no profits on the earlier job,
23 had no records or documents to support its expense estimates, and had failed to
24 segregate its costs and expenses on the project from other jobs with the developer. On
25 appeal, the developer challenged the portion of the lost profits award. The Virginia
26 Supreme Court agreed with the developer that the builder’s evidence was insufficient
27 to support a lost profits award because it consisted of unsupported assumptions and

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1
2 estimates, which did not afford a sufficient basis to estimate the profits on the
3 uncompleted work with reasonable certainty. ADC Fairways, 231 Va. at 317-18.

4 Virginia courts also recognize that a contract violator must not be permitted to
5 escape liability and that future damages “nearly always” involve “some uncertainty and
6 contingency, and can be determined only approximately upon reasonable conjectures
7 and probable estimates.” Du Pont, 191 Va. at 570. These courts apply the second
8 damages test, known as the Fact and Amount test, when causation is certain but the
9 nature of the defendant’s breach renders the amount of the plaintiff’s resulting future
10 damages uncertain. Id. Under these circumstances, a plaintiff need only show
11 sufficient facts and circumstances to permit the trier of fact to make an “intelligent and
12 probable estimate of the amount of damages thereby sustained” and “[t]he *only*
13 *practical way* to determine this value [is] to introduce evidence as to the probable
14 amount of sales” the plaintiff would have realized but for the defendant’s breach. Id.,
15 at 570-571, 572-73. Provided that the plaintiff is an established business, it can make
16 “an intelligent and probable estimate” of its lost profits “based upon and supported by
17 underlying revenue and cost records of similar business undertakings.” Com. Bus.
18 Sys., 249 Va. at 50; see Du Pont, 191 Va. at 573.

19 For example, Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382
20 (2012) (“Preferred”), involved a lost profits award for the loss of future contracts under
21 a government program. There, a government contractor sued a subcontractor who
22 breached a covenant not to compete by teaming with a rival contractor. The parties
23 were part of a team of contractors working for a federal agency under a blanket
24 purchase agreement. The agreement did not guarantee any work or funds; rather, it set
25 up a structure wherein the procuring agency issued task orders for specific deliverables
26 and the rival functioned as a “team leader,” overseeing and competing against other
27 contractors. The rival assumed responsibility over the contractor’s deliverables once
28 the subcontractor began working for it and the contractor sued. At trial, the contractor

1 estimated its lost profits by applying its established profit margins to the rival's
2 revenues on the deliverables the rival assumed.

3 The Virginia Supreme Court applied the Fact and Amount test and affirmed the
4 lost profits award on appeal. First, it rejected the subcontractor's assertion that
5 recovery was barred by the trial court's express finding that the contractor was not
6 guaranteed any future contracts under the purchase agreement. In lost profits cases, a
7 plaintiff need not show that future work was guaranteed; rather, it "is tasked merely
8 with proving the elements of damages from lost profits by a preponderance of the
9 evidence." The contractor's evidence was sufficient to show that it would have
10 continued to bill on the deliverables but for the subcontractor and the rival taking the
11 work for themselves. Id., at 398-99. Second, because it was an established business
12 and "there [was] no other practical way to estimate the damages," the contractor's lost
13 profits estimate was calculated by an accepted method supported by sufficient evidence
14 "to permit an intelligent and probable estimate of damages." Id., at 400.

15 Here, Bona Fide's damage is certain but the amount of its damages is uncertain
16 because SourceAmerica's breach of the Agreement prevented Bona Fide from
17 obtaining future Opportunities. Thus, the Fact and Amount test from Preferred, rather
18 than the Reasonable Certainty test in ADC Fairways, should apply to this case.

19 Bona Fide has supplied services to GSA through the AbilityOne Program since
20 2005 (PMF 1). Bona Fide was prevented from continuing to do business with GSA
21 because SourceAmerica breached the Agreement by interfering in the bidding process
22 (PMF 25-37). Any uncertainty over whether Bona Fide would have won any given
23 Opportunity but for SourceAmerica's conduct is attributable to SourceAmerica's
24 pretextual denials and cancellations of Opportunities (PMF 25-26, 33, 35-37). This is
25 sufficient for a reasonable jury to find that Bona Fide would have obtained all of the
26 Opportunities at issue under Preferred.

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While its final damages calculations have yet to be determined by its retained expert,⁶ Bona Fide can state to a certainty that it lost profits due to SourceAmerica's breach of the Agreement and provide a reasonably certain lost profits damages estimate. The estimate is based on taking the actual amounts billed to GSA as to each contract at issue in the case (SSNs 1483, 1741, 1944, 2075, 2161, 2381, 2410, 2693, 2705, 2783, 2808) or the estimated billings for cancelled opportunities at issue in the case (SSNs 1692, 1723, 1953, 2379) through March, 31 2017, reducing those figures to account for subcontracting arrangements where appropriate (SSN 1741, 1953, and 2075), and then multiplying the lost revenues by Bona Fide's own profit margin of [REDACTED] on Program contracts since it entered into the Agreement, to yield a lost profits estimate (PMF 42-72). The Virginia Supreme Court has expressly approved this methodology in cases dealing with contract breaches by government contractors affecting the result of bidding competitions. Preferred, 284 Va. at 400.

Thus, Bona Fide provisionally estimates its lost profits through March 31, 2017, as follows:

Project Name	Billing to Date	Subcontract Adj.	Profit Margin	Total Profits
Ft Hood (1483)	[REDACTED]	-	[REDACTED]	[REDACTED]
Lakewood (1692)	[REDACTED]	-	[REDACTED]	[REDACTED]
VA HQ (1723)	[REDACTED]	-	[REDACTED]	[REDACTED]
CONUS (1741)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
St. Elizabeth's (1944)	[REDACTED]		[REDACTED]	[REDACTED]
NGA I (1953)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
NGA II (2075)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Puerto Rico (2161)	[REDACTED]	-	[REDACTED]	[REDACTED]
USDA (2379)	[REDACTED]	-	[REDACTED]	[REDACTED]
Capitol (2381)	[REDACTED]	-	[REDACTED]	[REDACTED]
JFK (2410)	[REDACTED]	-	[REDACTED]	[REDACTED]

⁶ Bona Fide designated Brian Brinig to provide expert damages testimony on its behalf. The expert reports are due August 30, 2017 (Dkt. 426).

1	Wright-Patterson (2693)		-		
2	Shaw (2705)		-		
3	Chicago (2783)		-		
4	Camp Lejeune (2808)		-		
5			Grand Total	\$10,980,806.89	

6 (PMF 42-72).

7 Because Bona Fide has sufficient evidence for a reasonable jury to award it at
8 least \$10,980,806.89, the Motion must be denied.

9 **c. The Reasonable Certainty Standard Should Be Relaxed Where,**
10 **As Here, SourceAmerica Intentionally And Wrongfully**
11 **Breached The Agreement.**

12 Alternatively, if the Court concludes that Bona Fide's damage estimate does not
13 meet the Preferred requirements, the Court should nonetheless deny SourceAmerica's
14 Motion because the Court has the discretion to require a lesser showing from Bona
15 Fide based on SourceAmerica's intentional and wrongful conduct.

16 The third damages test, known as the Wrongdoer test, applies when "an
17 *intentional wrong* is involved." Wood v. Pender-Doxey Grocery Co., 151 Va. 706,
18 713 (1928). Under those circumstances, "the degree of proof necessary is much
19 relaxed in favor of the injured party." Id. Thus, where "the wrongdoer creates the
20 situation that makes proof of the exact amount of damages difficult . . . 'juries are
21 allowed to act upon probable and inferential, as well as direct and positive, proof.'" Id.;
22 accord Restatement (Second) of Contracts § 352, cmt. a (1981) (courts may consider
23 "all the circumstances of the breach, including willfulness, in deciding whether to
24 require a lesser degree of certainty" in proving damages).

25 For example, the plaintiff in Wood purchased a grocery store from the
26 defendant. The defendant breached a "good will" covenant in the purchase agreement
27 by soliciting his former customers to shift their business to his new grocery. The
28 plaintiff adduced testimony that the value of the purchased good will as between
\$6,000.00 to \$7,000.00. The jury awarded \$3,500.00 for violation of the good will. On

1 appeal, the defendant argued that the evidence was too uncertain as to the amount of
2 the plaintiff's damages. The Virginia Supreme Court disagreed and affirmed the
3 damages award because "definite and specific" proof as to "the extent of the damages"
4 is not required in Wrongdoer cases. The jury could "find the amount of damages by
5 drawing reasonable inferences from the facts, circumstances, and data furnished by the
6 evidence." Id., at 714.

7 Similarly, using the Wrongdoer test, the Virginia Supreme Court upheld a lost
8 profits award in favor of the plaintiff lighting supplier after one of the defendants
9 effectively sabotaged plaintiff's bids on various projects in Banks v. Mario Indus., 274
10 Va. 438 (2007). The plaintiff submitted evidence that it had a "prior working
11 relationship" with a contractor, the contractor solicited bids for a project, and the
12 suppliers' former agent tried to direct that business to one of its competitors by
13 submitting an overly-inflated "bogus bid." The plaintiff submitted estimates of its lost
14 profits on the project, which consisted of applying its gross profit margin to the
15 contract price. No other evidence was admitted, including the amount of the
16 competitor's bids. On appeal, the Virginia Supreme Court upheld the lost profits
17 award, finding sufficient evidence to support the jury's finding "that the defendants'
18 wrongful conduct caused [suppliers'] damages" and but for defendants' wrongdoing,
19 plaintiff "would have won the . . . project" and earned lost profits due to its "long-term
20 relationship" with the contractor. Id., at 457-58.

21 The Wrongdoer test applies here because, as shown below, SourceAmerica
22 wrongfully and wilfully breached the Agreement. Under the relaxed standard of proof
23 in Wood and Banks, a reasonable jury could infer from Bona Fide's evidence (PMF
24 25-37), that it would have won all of the Opportunities at issue but for
25 SourceAmerica's conduct and that it suffered at least \$10,980,806.89 in damages
26 (PMF 42-72).

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1 **i. SourceAmerica Wrongfully or Wilfully Breached the**
2 **Agreement by Violating Procurement Laws.**

3 Some of SourceAmerica's breaches of the Agreement violated JWOD and other
4 procurement laws, and the Program may not be used to violate "government
5 procurement policy." Barrier Indus. v. Echard, 584 F.2d 1074, 1080 (D.C. Cir. 1978).
6 Robinson admitted that SourceAmerica implemented prerequisites and restrictions in
7 its SSNs to make Bona Fide ineligible to bid on Opportunities and subsequent contract
8 awards. For example, the specifications in SSN 1483, 1944, 1953 and 2075 claimed
9 that possessing a private industry certification requirement, a facility security
10 clearance, or both, were bidding eligibility requirements, i.e., a bidder had to possess
11 such certifications or clearances to even be considered for the contract (PMF 27). Yet,
12 as Robinson admitted and SourceAmerica's own correspondence shows, [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] (PMF 28-29). Robinson further
16 explained that [REDACTED]
17 [REDACTED]
18 [REDACTED] (PMF 30). Ocean Elec. Corp. v. Laird, 473 F.2d 154, 154-56
19 (D.C. Cir. 1972).

20 Furthermore, NISP provides that a contractor with an existing facility clearance
21 may be used to bid on new contracts, but "[a] contractor or prospective contractor
22 cannot apply for its own [facility clearance.] A [government contracting authority] or
23 a currently cleared contractor may sponsor an uncleared company for [a facility
24 clearance]" on an as-needed basis (PMF 31). See MVS USA, Inc. v. United States,
25 111 Fed. Cl. 639, 644 n.5 (2013). Thus, by implementing a pre-existing security
26 clearance requirement, SourceAmerica effectively limited the pool of eligible NPAs to
27 those NPAs with prior contracting experience on projects requiring such a clearance
28 (PMF 32).

1 These restrictive certification and security clearance requirements violate
2 JWOD, which only requires “that a [NPA] demonstrate a potential to produce the
3 particular [service].” Barrier Indus., 584 F.2d at 1080. “The heart and soul of the
4 [JWOD] Act . . . is to assist [NPAs] through government procurement.” Id. Nothing
5 in JWOD, its legislative history, or its implementing regulations “limit[] set-asides to
6 [NPAs] already [providing] the [service] involved”; such limitations conflict with
7 Congress’s intent in creating the AbilityOne Program in the first place. Id.; 41 C.F.R.
8 § 51-2.4(a)(3) (NPA must demonstrate to the Commission “that it will have the
9 capability to meet Government quality standards and delivery schedules by the time it
10 assumes responsibility for supplying the Government”).

11 **ii. SourceAmerica Intentionally Breached The Agreement**
12 **By Subjecting Bona Fide To Arbitrary And**
13 **Discriminatory Treatment.**

14 The Agreement settled allegations that SourceAmerica’s unfair, arbitrary,
15 discriminatory, and retaliatory conduct toward Bona Fide “result[ed] in allocations of
16 contracts to other [NPAs], rather than to Bona Fide.” (PMF 18).

17 Under Virginia’s plain meaning rules, the Agreement imposes upon
18 SourceAmerica the obligation of using its best efforts to meet its contract promises.
19 Cangiano v. LSH Bldg. Co., 271 Va. 171, 181 (2006). In other words, SourceAmerica
20 must “use reasonable diligence as well as good faith in [its] performance of the
21 contract.” Va. Code Ann. § 8.2-306, Off. Comm.; Nat’l Data Payment Sys. v. Meridian
22 Bank, 212 F.3d 849, 854 (3d Cir. 2000) (“The duty of best efforts ‘has diligence as its
23 essence’ and is ‘more exacting’ than the usual contractual duty of good faith.”).
24 However, “[b]est efforts” is a more rigorous standard than ‘good faith’”; such clauses
25 exist to protect “a party that is at the mercy of another.” See also 2-6 Corbin on
26 Contracts § 6.5 (2016). Thus, Section 1.2’s “best efforts” clause obligates
27 “[SourceAmerica] to consider the best interests of [Bona Fide] and itself as if they
28 were one firm.” Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119, 1125 (3d Cir.
1992).

1 SourceAmerica intentionally and wilfully breached Section 1.2 in several ways.
2 First, SourceAmerica has not distributed a single Opportunity to Bona Fide since the
3 parties entered the Agreement (PMF 25). Robinson admitted that SourceAmerica's
4 former CEO, Robert Chamberlain, ordered his subordinates not to distribute any
5 Opportunities to Bona Fide after they entered into the Agreement (PMF 26).

6 Second, Robinson admitted that [REDACTED]
7 [REDACTED] (PMF 28).

8 Third, Robinson admitted that SourceAmerica's stated reasons for denying
9 Bona Fide the Opportunities at issue were pretextual and, if it could not find a
10 pretextual reason to deny Bona Fide an Opportunity, it would cancel it altogether:

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 (PMF 33) (emphasis added).

22 Fourth, Robinson admitted that SourceAmerica did not distribute Opportunities
23 to NPAs on the basis of merit. She told Lopez that, [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

1 [REDACTED]
2 [REDACTED]
3 (PMF 34-35).

4 She also admitted that SourceAmerica's evaluation and recommendation
5 process [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 [REDACTED] (PMF 36).

11 Finally, Robinson admitted that SourceAmerica's decision-making on
12 Opportunities was infected by invidious discrimination against racial minorities:

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 (PMF 37).

21 **B. SourceAmerica Is Not Entitled To Summary Judgment On Its Mitigation**
22 **Of Damages Affirmative Defense.**

23 SourceAmerica asks the Court to enter summary judgment on Bona Fide's
24 breach of contract claim on the ground that Bona Fide failed to mitigate its damages in
25 that it did not file Tucker Act bid protests in the Court of Federal Claims challenging
26 the Commission's acceptance of SourceAmerica's recommendations (Dkt. 406, 25:12-
27 27:11).

28 ///

1 Failure to mitigate damages is an affirmative defense in Virginia, and
2 SourceAmerica bears the burden of proof. Forbes v. Rapp, 269 Va. 374, 380 (2005).
3 Accordingly, SourceAmerica “must establish beyond peradventure *all* of the essential
4 elements of the . . . defense[s] to warrant judgment in [its] favor.” Willis v. Buffalo
5 Pumps, Inc., 34 F.Supp.3d 1117, 1121, 1125 (S.D. Cal. 2014). It fails to do so.

6 Bona Fide’s duty to mitigate damages requires it to “exercise reasonable care
7 and diligence to avoid loss or to minimize or lessen the resulting damage” and its
8 damages are reduced “to the extent that [such] damages are the result of” its failure to
9 do so. Lawrence v. Wirth, 226 Va. 408, 412 (1983). In other words, “[a]lthough
10 failure to exercise reasonable care and diligence may be a reason for *reducing*
11 *damages*, it does not bar all recovery.” Monton v. Am.'s Servicing Co., No. 2:11cv678,
12 2012 U.S. Dist. LEXIS 117259, at *23 (E.D. Va. Aug. 20, 2012).

13 It “is only incumbent upon [Bona Fide], to use reasonable exertion and
14 reasonable expense, and the question in such cases is always whether the act was a
15 reasonable one, having regard to all the circumstances of the particular case.”
16 Haywood v. Massie, 188 Va. 176, 183 (1948).

17 **1. It Would Not Have Been Reasonable For Bona Fide To File 15**
18 **Lawsuits To Mitigate Damages. At The Least, The Issue Is For The**
Jury To Decide.

19 SourceAmerica makes no showing that filing 15 different lawsuits in the Court
20 of Federal Claims would constitute reasonable exertion and expense by Bona Fide. It
21 cannot. Bona Fide’s two prior bid protests involved a single project. After it filed the
22 first protest, the Commission canceled the award and SourceAmerica resolicited the
23 Opportunity. The two bid protests cost more than \$100,000 to litigate (PMF 14).
24 Assuming the same pattern would have occurred here, it would not have been
25 reasonable for Bona Fide to expend \$1,500,000 in attorney’s fees to challenge the
26 Commission’s contract awards only to have to resubmit bids to SourceAmerica
27 following such litigation. Stohlman v. S & B Ltd. P’ship, 249 Va. 251, 255-56 (1995)

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1 (in suit to recover \$8.5 million on defaulted lease, it was not reasonable to require
2 plaintiff to pay \$950,000 to complete building construction).

3 **2. Bona Fide Was Not Obligated To Sue The Federal Government For**
4 **SourceAmerica's Breach Of Contract.**

5 Essentially, SourceAmerica's position is that Bona Fide should have filed
6 Tucker Act bid protests against the Commission, a United States agency, to remedy a
7 breach of SourceAmerica's contract obligations owed to Bona Fide. This argument
8 fails because SourceAmerica does not show which portion of Bona Fide's damages
9 were "aggravated or increased" by its decision not to pursue different lawsuits on
10 different contracts against the federal government. Lawrence, 226 Va. at 413.

11 This argument fails for another reason: "As a matter of law, a party that alleges
12 that its contract has been breached is not obligated to accept some other, less valuable,
13 performance proposed by the breaching party, and the rejection of such an offer cannot
14 possibly establish a viable mitigation defense." Auto. Fin. Corp. v. EEE Auto Sales,
15 Inc., No. 1:10cv1407(LMB/TRJ), 2011 U.S. Dist. LEXIS 70118, at *21 (E.D. Va. June
16 28, 2011) (mitigation defense failed because plaintiff was entitled to full payment on
17 demand for breach of agreement and did not have to accept defendants' offered
18 payment plan); E. Coal & Exp. Corp. v. Beazley & Blanford, 121 Va. 4, 10-11 (1917)
19 (defendant's mitigation argument regarding plaintiff's refusal to accept a novation "for
20 the delinquent's protection" was a "strange perversion" of the mitigation of damages
21 doctrine).

22 The Ninth Circuit affirmed this Court's determination that the Tucker Act does
23 not apply to this action in part because "Bona Fide's claims are not founded upon any .
24 . . implied contract with the United States." (PMF 73). This is the law of the case; the
25 Court cannot grant any relief inconsistent with the appellate court's decree or
26 reconsider this issue. United States v. Thrasher, 483 F.3d 977, 981 (9th Cir. 2007);
27 Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982).

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1 Accordingly, SourceAmerica argues that, rather than suing it directly, Bona Fide
2 should have sued the United States on an implied contract theory to force it to comply
3 with its contractual obligations under the Agreement. Yet, the Court of Federal Claims
4 lacks jurisdiction to review SourceAmerica's conduct, Bona Fide Conglomerate, Inc.
5 v. United States, 96 Fed. Cl. 223, 240-41 (2010), and cannot award Bona Fide its lost
6 profits, Lion Raisins, Inc. v. United States, 52 Fed. Cl. 115, 119 (2002). Indeed, the
7 Agreement was designed to give Bona Fide a direct money damages remedy against
8 SourceAmerica that it previously lacked in lawsuits under the Tucker Act (PMF 23).

9 Because SourceAmerica fails to carry its burden on mitigation of damages, the
10 Motion on mitigation must be denied. S. Cal. Gas, 336 F.3d at 888.

11 **V. CONCLUSION**

12 Based on the foregoing, Bona Fide respectfully requests that the Court deny the
13 Motion.

14 Respectfully submitted,

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